SUPREME COURT, U. S.

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No. 1034

In the

Supreme Court of the United States

OCTOBER TERM, 1968

HARPER & ROW PUBLISHERS, INC., *et al.*,

Petitioners,

—v.—

HON. BERNARD M. DECKER,
United States District Judge, *et al.*

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

Preliminary Statement

Because the treble-damage plaintiffs apparently recognize that respondent's document production order constitutes a "clear abuse of discretion" and a "usurpation of judicial power," they have chosen to disregard, and/or to distort, the relevant facts and applicable law discussed in the petition.[1] Accordingly, petitioners are constrained to file this reply brief, in order to point out some of the misrepresentations, inaccuracies, and incomplete statements relied upon by the treble-damage plaintiffs in their efforts to defend respondent's conduct.

[1] The petition for certiorari will be referred to hereinafter as "Pet.," and the treble-damage plaintiffs' brief in opposition to the petition will be referred to as "Pl. Br."

Most significantly, the brief in opposition virtually ignores the express requirements of Rule 34 and this Court's interpretations thereof, petitioners' due process rights, and traditional principles of grand jury secrecy, solely because of "the urgent need for efficient, simplified procedure in cases of the magnitude of the proceedings before Judge Decker" (Pl. Br., p. 27). This, of course, is the same position that the treble-damage plaintiffs have taken throughout the tortuous course of this litigation—that, solely because of considerations of convenience and expediency, they should be relieved of the "onerous and expensive burden" of complying with the Federal Rules of Civil Procedure, and should be granted unrestricted access to grand jury documents without even making an effort to establish "good cause" or "particularized need" (see Pet., pp. 6-8, 11-12, 15-19, 24-27). Indeed, the treble-damage plaintiffs have unhesitatingly, and unashamedly, admitted that their attempts "to secure from the Government the results of its investigation" have actually been motivated by their desire to "be able to *sort out* from the large volume of documents involved those that are relevant to discovery in their treble damage suits," in order to facilitate their prosecution of those private actions (Pet., pp. 6, 12) (emphasis supplied).

But the treble-damage plaintiffs have never even attempted to demonstrate the relevancy or materiality of the grand jury documents which they are seeking. Instead, they have relied merely on the unsupported assertion (made in a *separate* proceeding) that *all* of those documents are relevant and material (see *infra*, p. 8). In this respect, their position clearly is inconsistent both with this Court's recognition that the "good cause" requirement of Rule 34 "is not a mere formality, but is a plainly expressed

limitation of the use of the Rule" (*Schlagenhauf* v. *Holder*, 379 U.S. 104, 117-118 (1964)), and also with this Court's holding that the "indispensable secrecy of grand jury proceedings . . . must not be broken except where there is a compelling necessity"—i.e., something more than the mere "relevance" and "usefulness" of the information sought (*United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 682-683 (1958)) (see Pet., pp. 28-31). Although the treble-damage plaintiffs have artfully attempted to convey the erroneous impression that the relevancy and materiality of the documents sought has been established (Pl. Br., pp. 22, 28), their mere unsupported assertion to that effect manifestly does not satisfy the requirements enunciated in Rule 34 and in this Court's opinions.[2] Surely if neither a state nor Congress can authorize government officials to inspect documents without compliance with the Fourth Amendment, a district court cannot properly grant private litigants unrestricted access to private documents of other parties unless equally stringent standards are met (see *Katzman* v. *United States*, 389 U.S. 347 (1967); *Berger* v. *New York*, 388 U.S. 41 (1967); *Camara* v. *Municipal Court*, 387 U.S. 523 (1967); *See* v. *City of Seattle*, 387 U.S. 541 (1967)).

Moreover, the treble-damage plaintiffs now complain, incorrectly, that petitioners have requested "an evidentiary hearing on the question of good cause," and that requiring them to utilize interrogatories or "to conduct depositions or other discovery proceedings in order to establish a foundation for [a] Rule 34 motion . . . would result in chaos,

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[2] "Rule 34 authorizes the District Court to order production of documents, papers, etc., upon motion of a party '*showing* good cause,' not upon a mere allegation or recitation that good cause exists." *Martin* v. *Capital Transit Co.*, 170 F. 2d 811, 812 (D. C. Cir. 1948) (emphasis in original).

[and] resolution of this case would be delayed for many years" (Pl. Br., pp. 24-25, 27). In fact, however, petitioners have *not* requested an evidentiary hearing regarding "good cause," but merely have insisted that the treble-damage plaintiffs be required to comply with the "good cause" requirement of Rule 34, particularly because disclosure of grand jury documents is involved. Moreover, the treble-damage plaintiffs have neglected to mention that they have *already* received defendants' voluminous answers to interrogatories which expressly were intended to disclose the "existence, location and custodian" of relevant documents (see Pet., pp. 8-11). Why, then, would there be "chaos" or "prolonged delay" if plaintiffs were required to "establish a foundation for their Rule 34 motion," which seeks unrestricted access to the results of the grand jury investigations?

Also significant are the treble-damage plaintiffs' repeated, and deliberately misleading, assertions that they are seeking the grand jury documents "for their intrinsic value in the treble damage actions," and that "the only connection between these documents and a grand jury is that copies of them were produced in response to a subpoena issued by a grand jury" (Pl. Br., pp. 31, 33). In fact, however, the treble-damage plaintiffs' interest in the grand jury documents *is based entirely upon the grand juries' interest in those documents,* as can readily be seen from their inability to describe with any meaningful specificity the subject matter of the documents which they seek (see Pet., pp. 31-34). But the grand jury investigations related to the entire publishing industry, rather than merely to sales of library editions of children's books (see *infra,* pp. 6-8); it is therefore obvious that many (if not most) of the grand jury documents have no bearing on the treble-

damage actions, and that the treble-damage plaintiffs could not possibly establish "good cause" for the wholesale disclosure of those documents. That, of course, is the real basis of their desperate efforts to avoid application of Rule 34 to this litigation; if they were required to comply with that Rule, they would not "be able to sort out" relevant documents from the mass of material which was obtained by the grand juries through the exercise of their sweeping investigatory powers. But, as the Court of Appeals for the Tenth Circuit recently said (albeit in a different context):

> "The expeditious and efficient processing of litigation is laudable and should be encouraged. But the Federal Rules provide an adequate and orderly procedure . . . . Only by adherence to the spirit of these rules can we be sure of a full hearing—the essence of due process." *Sooner State Dairies, Inc.* v. *Townley's Dairy Co., et al.*, 1969 CCH Trade Cas. ¶72,711 (10th Cir. 1969).

Accordingly, the treble-damage plaintiffs should be compelled to submit a *meaningful and specific* Rule 34 motion, and document production should be ordered only insofar as they can establish "good cause" therefor.

Also underlying the treble-damage plaintiffs' castigation of the petition for certiorari is their contention that petitioners have already had a full and meaningful hearing with respect to the questions of "good cause" and "particularized need." The unsoundness of that contention, however, is convincingly demonstrated by the treble-damage plaintiffs' reliance upon inaccuracies and misrepresentations to support it. In order that this Court may consider the petition in a proper perspective, the balance of this reply brief will discuss the principal misleading factual and legal assertions advanced by the treble-damage plain-

tiffs with respect to the purported adequacy of the hearing afforded to petitioners, and with respect to the propriety of respondent's document production order.

The Treble-Damage Plaintiffs Have Asserted, Incorrectly, That Their Private Actions Are Virtually Identical in Scope to the Grand Jury Investigations and the Government Civil Actions

1. Initially, the treble-damage plaintiffs describe the grand jury investigations as "a narrowly defined investigation by the Antitrust Division," and assert that the only grand jury documents encompassed by respondent's document production order had been subpoenaed "in the course of an investigation *confined to the illegal behavior* charged in both the civil complaints and treble damage actions" (Pl. Br., pp. 21, 26) (emphasis supplied). But, as the treble-damage plaintiffs have neglected to mention, respondent's document production order expressly states that the grand jury investigations related to the *entire* "publishing industry" (Pet., App. B, p. 6a), whereas the private damage actions (as well as the Government civil actions) relate to *only one facet* of that industry—the sale of library editions of children's books.

2. The treble-damage plaintiffs also attempt to convey the erroneous impression that the Government civil actions involved a nationwide horizontal price fixing conspiracy (Pl. Br., pp. 3, 25-26). But, as the Department of Justice itself has stated, each of the 18 actions which it filed "named a [single] book publisher as a defendant and charged a [vertical] price-fixing conspiracy between the publisher and, in effect, its wholesalers in the sale of library editions of children's books" (Department of Jus-

tice brief, dated January 10, 1968, in *In Re Grand Jury Proceedings,* No. 66 GJ 3003 (N. D. Ill.), p. 1).

3. The treble-damage plaintiffs repeatedly assert that their private damage actions are "similar to" or "are based in large part on" the Government civil actions (Pl. Br., pp. 3, 25-26). But those Government actions were much more limited in scope than the treble-damage actions, and *most* of the defendants in the damage actions (including many publishers, despite the treble-damage plaintiffs' assertion to the contrary (Pl. Br., pp. 25-26)) were *not* defendants in the Government actions.[3]

4. In any event, even if the treble-damage complaints were identical to the complaints in the Government actions, all of the documents which were subpoenaed during the grand jury investigations would not *ipso facto* be relevant or material to the damage actions (or even to the Government actions). On the contrary, because respondent's document production order broadly encompasses *all* of the documents which were subpoenaed from the damage-action defendants during grand jury investigations *of the publishing industry,* it is manifest that many of those documents are wholly unrelated to the subject matter of the treble-damage actions (sales of library editions of children's books). This was plainly recognized by plaintiffs' liaison counsel, when he revealed that the treble-

[3] As noted in the petition for certiorari (pp. 5-6), the complaints in the treble-damage actions allege three different types of conspiracies: horizontal conspiracies among publishers; horizontal conspiracies among wholesalers; and vertical conspiracies among publishers and wholesalers. Each of the Government actions, on the other hand, alleged only vertical conspiracies between the single named publisher-defendant and *its* wholesalers.

damage plaintiffs were seeking access to all of the grand jury documents so that they would then "be able to sort out from the large volume of documents involved those that are relevant to discovery in their treble damage suits" (see *supra,* p. 2).

The Treble-Damage Plaintiffs Artfully Strive to Convey Several Erroneous Impressions With Respect to Their Petition to Chief Judge Campbell

1. Despite the treble-damage plaintiffs' insinuations to the contrary (Pl. Br., pp. 5-6, 24), their petition to Chief Judge Campbell was *not* a Rule 34 motion, and it was *not* presented in a civil action. Moreover, the parties' briefs with respect to that petition did *not* discuss either Rule 34 or the principles which govern its application. On the contrary, the treble-damage plaintiffs' brief asserted simply that considerations of convenience and expediency warranted the requested document disclosure; they made no effort to *demonstrate* the relevancy or materiality of the documents sought, relying instead on a mere unsupported assertion regarding relevancy and materiality (see *supra,* p. 2). The publisher-defendants responded that the requisite "particularized need" had not been established, and that grand jury secrecy could not properly be violated merely to relieve private litigants of "the onerous and expensive burden" of conducting appropriate discovery in their civil actions (Pet., pp. 7-8, n. 6).

2. The treble-damage plaintiffs state unequivocally that the Justice Department "had no objection" to their petition for disclosure of the grand jury documents (Pl. Br., pp. 6, 31, n. 17). Those statements, however, deliberately

misrepresent the Justice Department's position, as can readily be seen from the "Reply" which the Justice Department submitted to Chief Judge Campbell:

> "The United States objects to the production of documents obtained by grand jury subpoenas unless and until the court enters an order granting such disclosure as it deems proper after the owners of said documents are given notice and an opportunity to be heard." Justice Department Reply to Petition, dated November 20, 1967, p. 2.

3. Moreover, the parties' briefs to Chief Judge Campbell were *not* submitted either to the Coordinating Committee or to respondent, and thus the proceedings before Chief Judge Campbell clearly did *not* constitute a hearing regarding the treble-damage plaintiffs' right to conduct discovery in their civil actions (Pl. Br., pp. 24-25).

4. The treble-damage plaintiffs' assertion (Pl. Br., p. 7) that Chief Judge Campbell's June 27, 1968 opinion and order "did not constitute a rejection of the relief sought in the petition" is flatly contradicted by the express language of the Chief Judge, who stated that he had found "no exceptional circumstances which would warrant the granting of the petition," and that "it has been determined that this petition should be denied because adequate civil procedures are currently available to the parties" (Opinion and Order, pp. 5-6, 11).

5. Finally, Chief Judge Campbell's decision was *not* based upon what occurred at the Coordinating hearing in Kansas City, and he did *not* "assume that plaintiffs were entitled to inspect the documents subpoenaed by the grand jury" (Pl. Br., p. 7). Although his opinion and order

referred to that hearing, he did *not* comment either upon its propriety or upon the soundness of the Coordinating Committee's recommendations. Accordingly, it is ridiculous even to suggest that he acted in anticipation that the treble-damage plaintiffs would be able to obtain any document production without fulfilling the requirements of Rule 34. Chief Judge Campbell's decision related solely to the petition before him, whereby the treble-damage plaintiffs sought to obtain wholesale access to grand jury documents without reference to Rule 34, in a proceeding separate and apart from their civil actions.

The Treble-Damage Plaintiffs Seek to Convey the Erroneous Impression That the Proceedings Before the Coordinating Committee Afforded Petitioners an Adequate Hearing With Respect to the Merits of Document Production

1. The treble-damage plaintiffs have carefully ignored two of the three orders which the Coordinating Committee promulgated prior to its April 19, 1968 hearing, and have quoted out of context from the third, in an effort to suggest that the Committee announced that it intended to consider the *merits* of document production at that hearing (Pl. Br., pp. 7-8). But when those three orders are read together (as they must be), they demonstrate beyond question that the April 19 hearing purported to relate *only* to the so-called "first wave of discovery"; in pertinent part, that "first wave" involved determination of "the existence, location and custodian of documents . . . , *the production of which may be sought on the merits*" (emphasis supplied), but did not involve consideration of the merits of any actual request for document production (see Pet., pp. 9-11). This procedure, of course, is in accordance

with the recommendations of the *Manual for Complex and Multidistrict Litigation,* and in fact the language of the Coordinating Committee's three orders is virtually identical to the *Manual's* description of an appropriate "first wave of discovery" in complex multi-district litigation (see Pet., p. 11, n. 9).

2. Moreover, plaintiffs' liaison counsel, in an April 3 memorandum to respondent, and again at the commencement of the April 19 hearing, stated unequivocally that consideration of the merits of Rule 34 motions at that time "would be premature," because Chief Judge Campbell had not yet ruled on the petition for production of grand jury documents (Pet., pp. 11-12).[4]

3. The treble-damage plaintiffs carefully, although not surprisingly, ignore Judge Becker's express concession that the April 19 hearing did not concern the merits of document production (Tr., p. 28; see Pet., p. 12). Instead they suggest, by quoting out of context, that "counsel for the publisher defendants argued at great length about the adequacy of 'the Rule 34 motion, which is being presently contended for'" (Pl. Br., p. 22). In fact, that quotation was taken from a statement by counsel for the publisher-defendants that "We did not believe that *the Rule 34 motion, which is being presently contended for,* was within

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[4] The treble-damage plaintiffs' suggestion that plaintiffs' liaison counsel merely "asked for a delay of the Judicial Panel's determination as to the document production order" (Pl. Br., pp. 8-9) conceals the true nature of his remarks, for he stated unequivocally that plaintiffs had not "put forward a Rule 34 motion . . . because we think it is premature," and that therefore the Coordinating Committee should not even consider the merits of document production at that time (Tr., pp. 14-15).

the scope of the Court's order [regarding matters to be considered at the hearing]" (Tr., p. 47).

4. Nor did the brief colloquy between Judge Becker and counsel for the publisher-defendants constitute an adequate hearing, or an "argument at great length," regarding the merits of document production (Pl. Br., pp. 11, 22, 24). On the contrary, during the course of that colloquy, Judge Becker expressly stated that the Coordinating Committee was then considering document production motions only "insofar as they are relevant to this case and relate to the first wave of discovery" (Tr., p. 48). And, during the same colloquy, counsel for the publisher-defendants stated that "we would appreciate the opportunity, of course, to argue this [the merits of possible production of grand jury documents] *at length at some date after Judge Campbell has ruled*" (Tr., p. 48) (emphasis supplied). Moreover, it should be noted that that colloquy occurred *after* plaintiffs' presentation to the Coordinating Committee, during which plaintiffs' counsel had not even attempted to establish "good cause" for the production of any documents, and indeed had expressly stated that consideration, or even submission, of Rule 34 motions at that time was "premature" (see *supra*, p. 11).

5. The treble-damage plaintiffs' description of Judge Becker's comments at the conclusion of the April 19 hearing suggests, erroneously, that the Coordinating Committee was thereby enunciating binding "decisions" that "good cause" existed for the production of all documents which the grand juries had subpoenaed from any of the defendants in the treble-damage actions (Pl. Br., p. 11). On the contrary, Judge Becker apparently recognized that the

Coordinating Committee had no jurisdiction to enter discovery orders which would be binding in the damage actions, because he spoke only in terms of the Committee's "recommendations" and "suggestions." He did not state that "good cause" had been established, but merely *recommended* that the various district judges "*consider* making a finding of good cause, which is necessary under Rule 34" (Tr., pp. 78-81) (emphasis supplied). Moreover, his recommendations did not relate to all documents which the grand jury had subpoenaed, but merely to "the Grand Jury documents in the Government's case *which led to the Government's case in Chicago*" (Tr., p. 80) (emphasis supplied).

6. Finally, the treble-damage plaintiffs assert that petitioners submitted "extensive written comments" to the Coordinating Committee with respect to the merits of document production, and that petitioners "in effect conceded that a motion to produce documents had been adequately presented, argued and considered" before the Coordinating Committee (Pl. Br., pp. 22, 24). But petitioners did not submit *any* written comments to the Coordinating Committee concerning the merits of document production prior to the April 19 hearing, because the Coordinating Committee had not indicated that it was then considering that issue. And surely petitioners' submission of a draft order to the Coordinating Committee after the April 19 hearing did *not* constitute a "concession" with respect to any of the matters referred to therein (Pl. Br., pp. 13-14); on the contrary, that draft order was submitted pursuant to Judge Becker's request that the parties prepare draft orders incorporating the Committee's oral recommendations, and petitioners expected

that each of the district judges before whom the damage actions were pending would hold a hearing with respect to the merits of document production. Under those circumstances, petitioners' submission of that draft order (and their letters commenting on it) clearly was not intended as, and cannot properly be characterized as, an admission or a concession, either with respect to the effect of the Coordinating Committee's "suggestions" and "recommendations," or with respect to the propriety of respondent's unquestioning adoption of those suggestions and recommendations without any hearing, argument or meaningful consideration regarding their merits.

The Treble-Damage Plaintiffs Strive to Create the Erroneous Impression That Respondent Held a Full and Adequate Hearing With Respect to the Merits of Document Production Before He Entered National Pretrial Order No. 1

1. Despite the treble-damage plaintiffs' assertions to the contrary, the extremely abbreviated pretrial conference before respondent on July 11, 1968 clearly did *not* afford petitioners either "ample opportunity . . . to contest the proposed finding of good cause" or "a full opportunity to contest and be heard on every aspect of the proposed order [National Pretrial Order No. 1], including the finding of good cause for the production of documents" (Pl. Br., pp. 15, 23). Respondent *first* distributed proposed National Pretrial Order No. 1 to counsel at the commencement of that July 11 pretrial conference, after which petitioners' counsel had an opportunity to comment only briefly (in less than five pages of transcript) with respect to the *entire* proposed order; their only reference to the merits of document production was a request that the respondent defer

ruling on that issue, pending a hearing on it at some time after the Section 1407 panel ruled on the pending motions for consolidation.

2. At the conclusion of that brief presentation, respondent directed the numerous counsel present to submit comments with respect to the entire proposed order *by the following day.* Because of that severe time limitation, petitioners' counsel were not able, and did not attempt, to argue the merits of document production in the letter which they submitted to respondent on July 12. Accordingly, that letter merely requested a hearing regarding the merits of document production, on the ground that petitioners had not yet had such a hearing (see Pet., p. 16).

3. Nevertheless, on July 16, 1968, respondent adopted National Pretrial Order No. 1 exactly as it had been promulgated by the Coordinating Committee, except for six minor changes (not relevant here) which the Committee had previously approved.[5] That order included an express finding that there was "good cause" for the production of documents, although there was absolutely nothing before respondent upon which he could properly have based such a finding. In fact, the plaintiffs in the treble-damage actions pending before respondent had never even requested the entry of any document production order (either

[5] The treble-damage plaintiffs' assertion (Pl. Br., p. 28) that "no prejudice will result to defendants because of the inclusive protective order entered by Judge Decker in connection with his production order" is patently irrelevant; petitioners here are questioning the treble-damage plaintiffs' right to obtain production of the grand jury documents in the first place, not the need for restrictions on the use of documents if production should occur.

by formal motion or otherwise), and they had never attempted to demonstrate "good cause" for *any* document production, let alone for the wholesale production of grand jury documents which respondent directed at that time.[6]

4. Finally, the treble-damage plaintiffs' suggestion (Pl. Br., pp. 18-19, 23) that petitioners "have not proceeded with sufficient diligence in this action" is utterly without merit. Initially, it should be noted that many of the petitioners here were not defendants in the actions pending before respondent on July 16 (when he entered National Pretrial Order No. 1), and consequently had no standing to question his action. Moreover, because the Section 1407 Judicial Panel was then considering various motions for consolidation of the pending treble-damage actions, petitioners believed that questions regarding the merits of document production should be argued (and appealed, if necessary) in only one jurisdiction, so as to avoid the possibility of conflicting rulings in different district or appellate courts.[7] Finally, in considering the assertion that this proceeding is not timely, it should be noted that respondent's July 16 order contemplated the production of

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[6] Despite the treble-damage plaintiffs' frequent references (Pl. Br., pp. 22, 25) to the affidavits which were filed (concurrently with the complaints) in the actions pending in the Northern District of California, those affidavits were not before respondent on July 16, when he adopted National Pretrial Order No. 1. Moreover, the unsupported conclusory averments in those affidavits manifestly do not constitute a sufficient *showing* of "good cause," as numerous cases have held (see *supra*, p. 3).

[7] Petitioners' position in this respect was consistent with Judge Becker's recent statement that Section 1407 was intended "to eliminate the potential for conflicting contemporaneous pretrial rulings by coordinate district and appellate courts in multidistrict related civil actions" (see Pet., p. 17, n. 13).

grand jury documents *by the defendants,* rather than by the Department of Justice (as provided by respondent's December 13 order, to which this proceeding relates); consequently, petitioners anticipated that they would be able to seek review of respondent's July 16 document production order through a contempt proceeding, by refusing to produce the documents called for (see Pet., p. 4, n. 2).

The Treble-Damage Plaintiffs Assert, Incorrectly, That the Post-Consolidation Proceedings Before Respondent Afforded Petitioners a Full and Adequate Hearing With Respect to the Merits of Document Production

1. Shortly after the various treble-damage actions were consolidated before respondent in October, 1968, he scheduled a December 13 pretrial conference, and asked the parties to submit proposed agendas listing matters to be discussed at that conference. The publisher-defendants submitted an agenda stating that they proposed to move for a hearing regarding the merits of document production, but respondent summarily rejected that proposal even before the December 13 pretrial conference. In a November 27 letter to counsel, he stated simply that "National Pretrial Order No. 1 decided *authoritatively* that the documents requested by Exhibit E should be produced" (Pet., App. C, p. 11a) (emphasis supplied), thereby expressing his belief that the Coordinating Committee's "recommendations" constituted a binding decision on that issue.

2. Despite the treble-damage plaintiffs' inaccurate characterization of the December 6 proceeding before respondent (Pl. Br., pp. 23-24), petitioners did not then "argue" the merits of the proposed document production. On the contrary, petitioners merely *renewed their request for a hearing* with respect to the merits of document production,

a fact which is demonstrated graphically by respondent's statement to defendants' counsel (during that December 6 proceeding) that "I don't think you are going to be spending your time profitably trying to convince me that there isn't good cause . . . " (Tr., p. 34).

3. Moreover, petitioners did *not* submit a brief regarding the merits of document production either to respondent or to the Coordinating Committee (Pl. Br., pp. 23-24). Their only remotely related brief was filed before Chief Judge Campbell with respect to the treble-damage plaintiffs' petition for disclosure of grand jury documents; that brief, however, was *not* submitted either to respondent, or to the Coordinating Committee.

4. Finally, respondent's December 13 "finding of good cause," on which the treble-damage plaintiffs rely (Pl. Br., pp. 16-17), must have been based solely on the Coordinating Committee's "recommendations" and "suggestions" which respondent had adopted on July 16, because the treble-damage plaintiffs never even attempted to make a showing of "good cause" before respondent.[8]

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[8] Accordingly, it is impossible to ascertain the basis of the treble-damage plaintiffs' assertion that "the factors enumerated by plaintiffs in the record before the District Court fully support the order for production of documents" (Pl. Br., p. 25), because the record before respondent does not contain *any* factors which might support such an order. In this connection, the treble-damage plaintiffs' reliance on *Connecticut Mutual Life Insurance Co.* v. *Shields,* 17 F.R.D. 227 (S.D. N.Y. 1955) is unintelligible, because there is simply nothing in that opinion which has even a remote bearing on any aspect of this proceeding. Moreover, the suggestion that the petition for certiorari is based merely on the fact that "the District Court allegedly weighed one factor more heavily than another to determine that good cause had been shown" (Pl. Br., p. 21), ignores the fact that convenience and expediency are the only "factors" which have ever been asserted to justify respondent's document production order.

The Treble-Damage Plaintiffs' Discussion of the Relevant Cases Is Incomplete and Inaccurate

1. Despite the treble-damage plaintiffs' assertion to the contrary (Pl. Br., pp. 31-33), the law is well settled that documents subpoenaed by, and submitted to, grand juries constitute "matters occurring before a grand jury," and are protected by traditional grand jury secrecy (see Pet., pp. 30-31).

2. Additionally, the principles enunciated in *In Re April 1956 Term Grand Jury,* 239 F. 2d 263 (7th Cir. 1956) clearly are applicable even where there is not an "abuse and perversion of the normal functions of the grand jury" (Pl. Br., p. 33, n. 18); the Seventh Circuit itself so held in *In Re Holovachka,* 317 F. 2d 834, 836-838 (7th Cir. 1963) (Pet., pp. 30-31), a case which the treble-damage plaintiffs have conveniently ignored.[9] The two district court decisions which purportedly limit the effect of those principles (Pl. Br., p. 33, n. 18) are clearly inapplicable, because both of those cases involved the right of Antitrust Division attorneys (not private litigants) to obtain access to grand jury documents and other grand jury materials.

3. The treble-damage plaintiffs' reliance on *United States* v. *Interstate Dress Carriers, Inc.,* 280 F. 2d 52 (2d Cir. 1960) and *In Re Hearings Before the Committee on Banking and Currency of the United States Senate,* 19

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[9] In fact, the treble-damage plaintiffs have attempted to divert this Court's attention from the often-stated principle that the mere "convenience of discovery" does not warrant encroachment upon the traditional secrecy of grand jury proceedings (see Pet., pp. 30-31).

F.R.D. 410 (N. D. Ill. 1956) likewise is misplaced (Pl. Br., pp. 31-33). Both of those cases involved efforts by government agencies to obtain documents which merely "happened to be in the control of the grand jury" at the time, and in each instance the government agency (unlike the treble-damage plaintiffs here) had clearly demonstrated its "independent legal authority for the inspection" of the documents, which authority was *entirely unrelated* to the grand jury's interest in those documents (see Pet., pp. 32-33).

4. The treble-damage plaintiffs have virtually ignored the numerous cases (including *Schlagenhauf* v. *Holder, supra*) which have enunciated and applied the well-settled rule that the "good cause" requirement of Rule 34 is not a mere formality, and cannot be satisfied by a mere showing of relevance (see Pet., pp. 28-30). Instead, the treble-damage plaintiffs have again advanced the utterly false claim that the wholesale disclosure of grand jury documents which respondent has ordered is consistent with "standard procedure" in private treble-damage actions, and they have again cited several uncontested orders to "support" that claim (Pl. Br., pp. 28-29, n. 14).[10]

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[10] The impropriety of the treble-damage plaintiffs' claim in this respect is vividly demonstrated by an analysis of their assertion that, in *Eastland Construction Co.* v. *American Radiator and Standard Sanitary Corp.*, No. 46167 and related cases (N. D. Calif.), Judge Harris "after argument . . . as to propriety of discovery motion" entered a document production order similar to that entered by respondent (Pl. Br., p. 29, n. 14). In fact, counsel in those cases had *agreed*, while the cases were pending before another judge, to produce certain documents. The cases were subsequently reassigned to Judge Harris, who entered an order, *sua sponte*, staying all discovery; the June 26 "argument" upon which the treble-damage plaintiffs rely was merely a request by the parties that Judge Harris *modify that stay order* so that they could fulfill their prior commitments regarding discovery.

5. Finally, petitioners cite several cases holding that disclosure of grand jury proceedings *may* be ordered in private treble-damage actions (Pl. Br., p. 33, n. 19). Petitioners obviously do not dispute that abstract proposition. In each of the cited cases, however, the moving party had demonstrated "particularized need" for the requested disclosure of grand jury proceedings. By contrast, the treble-damage plaintiffs here have not even attempted to make such a showing.

Conclusion

In short, the treble-damage plaintiffs have attempted to convey the misleading impression that respondent's document production order was based upon a careful showing of "good cause" and "particularized need," and was entered only after petitioners had been afforded the full hearing to which they clearly were entitled. But, as the petition for certiorari and this reply brief demonstrate beyond question, nothing could be further from the truth. Petitioners have never had a meaningful hearing with respect to the merits of document production, and respondent acted entirely on the basis of considerations of expediency and convenience, without regard to the rights guaranteed to petitioners by the express requirements of Rule 34 and this Court's interpretations thereof, and without regard to traditional principles of grand jury secrecy. But such action by respondent surely is not justified merely because the instant proceeding involves complex multi-district litigation which has been consolidated pursuant to 28 U.S.C. §1407. Accordingly, because this

Court's guidance is necessary to insure that litigants' rights are protected in these circumstances, the petition for a writ of certiorari should be granted.

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